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Leg

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NOTE FOR: AGC/DDO

FROM: Deputy Director for Legislation
Office of Congressional Affairs

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SUBJECT: Berman Bill - HPSCI "Fixes"

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we briefed Mike O'Neil on our concerns with the Berman Bill, especially Sections 2 (the exemption for intelligence activities) and 8.

He discussed the matter with the House Foreign Affairs Committee staff and proposed the attached as solutions: 1) New Section 2 (h); 2) new Section 8; and, 3) colloquy between Representative Stokes and Fascell.

The Foreign Affairs Committee plans to take action on the bill at a session scheduled for Tuesday, 29 March 1988.

Staff would like our reaction to the proposals as soon as possible. We'd appreciate your views by close of business today or sooner.

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Attachments

OCA/LEG, (24 March 1988)

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New Section 2 (h)

New 2 (h): "The prohibitions contained in this section do not apply with respect to any transfer [required to be] reported to Congress in accordance with the provisions of Title V of the National Security Act of 1947 (50 U.S.C. §413 et seq).

New Section 8

H.R. 3651
15 March Version

On page 20, line 8, strike everything through the period on line 17 and insert in lieu thereof the following:

"(e)(1) Any transfer or assistance in the transfer of any munitions item by the United States government directly or indirectly to any foreign government or any other person outside the United States must be reported to Congress in accordance with the provisions of Title V of the National Security Act of 1947 (50 U.S.C. 13 et seq.), this act, the Foreign Assistance Act of 1961 as amended, or the Export Administration Act of 1979 (50 U.S.C. App.)."

COLLOQUY

FASCELL: At this point I would ask the gentlemen from Ohio, the distinguished chairman of the Intelligence Committee, to engage in a colloquy concerning those provisions of the bill which relate to intelligence activities.

New section 36(e) of the Arms Export Control Act provides that all transfers by the United States Government to any foreign government or any person outside the U.S. government of items on the munitions list must be reported to Congress, either as an intelligence activity under the National Security Act, or under the provisions either of the Arms Export Control Act, the Foreign Assistance Act, or the Export Administration Act. The purpose of this provision is to ensure that there are no activities overt or covert, which can take place except under one of several statutory frameworks requiring reporting to Congress. My concern with respect to intelligence transfers, is as follows: is it possible that transfers of items on the munitions list can be made for purposes other than covert action - which requires a Presidential finding which must be reported to the intelligence committees before it is implemented - so that the result is that a transfer for intelligence collection purposes may not be reported to the intelligence committees until sometime after it may have taken place?

STOKES: If the gentlemen will yield. My response would be as follows: All covert actions require a finding. All findings must be reported to the intelligence committee prior to activities initiated under their authority. While there is dispute about exactly under what circumstances prior notice may be deferred by the President, nearly everyone agrees that these circumstances will be rare. In any event, decisions of this kind are governed by the provisions of the National Security Act, whether or not it is amended by the Congress.

However, with respect to other intelligence activities, a different regime applies. Intelligence activities which reach the level of significance to be termed "significant anticipated intelligence activities" must be reported like covert actions, prior to their initiation. Other intelligence activities must be reported to the intelligence committees "fully and currently" but not necessarily prior to their initiation.

There is a range of intelligence collection activities (that) falls in this latter category. For instance, the provision some personal weapon or piece (of) surveillance equipment to an intelligence agent usually would not require prior notification to the intelligence committee.

Further, it is the case that some individuals with whom our intelligence services must deal for the collection of intelligence will be unsavory. They may have terrorist connections. But, in many cases, these relationships need not be reported in advance to the intelligence committees.

These cases, however, should be distinguished from an intelligence transfer for whatever purpose, to a government-designated as a terrorist government. Such a transfer most likely will require prior notification to the intelligence committees as a significant anticipated intelligence activity. Further, transfers to some individuals could also be significant anticipated intelligence activities because of their policy implications, risk, cost, or other considerations.

FASCELL: I thank the gentlemen. Let me pose an additional question. Is the intelligence committee satisfied that it has in place or will, with the passage of H.R. 3822, have in place sufficient procedures and reporting requirements to insure that it is informed of all transfers of items on the munitions list which require the attention of the committee?

STOKES: If the gentlemen will yield further, there are some changes in H.R. 3822 which will increase reporting of transfers of items on the munitions list to the intelligence committees and formalize the reporting of the use of non-appropriated funds. In addition, the intelligence committee does have other procedures or reporting requirements which it has imposed from time to time to insure that transfers by the U.S. Government or even transfers within the U.S. Government of items on the munitions list will be reported to the committee. At present, it is my opinion that these procedures and requirements are adequate.

Further, transfers of items on the munitions list such as those which took place during the Iran/contra affair now would be required to be reported under current procedures and requirements.